Tan Chang Yong Holding Sdn Bhd v Tan Wee Lee & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-193–09 OF 2017
EVROL MARIETTE PETERS JC
4 AUGUST 2019

Civil Procedure — Consent order — Effect of — Consent order recorded in suit by plaintiff against defendant stated that certain monies payable by plaintiff to defendant be deposited into court 'until the final disposal of this suit' — Upon dismissal of suit, defendant applied for payment out of monies deposited in court — Plaintiff opposed application saying it had filed appeal and would be prejudiced if monies were released to defendant — Whether phrase in consent order referred only to the conclusion of the suit itself and did not include appeal — Whether interpreting phrase to include appeal amounted to rewriting consent order — Whether filing of appeal did not automatically operate as stay of execution — Rules of Court 2012 O 55 r 16

The third defendant ('D3') in the instant suit had sued the plaintiff and obtained a monetary judgment against it ('the judgment sum') in a previous suit ('Suit 69'). The plaintiff appealed against the judgment to the Court of Appeal ('COA'). D3 agreed to allow the plaintiff a stay of payment of the judgment sum pending disposal of the appeal and during that interim period the judgment sum was held by a stakeholder ('LKG'). Following the dismissal of its appeal, the plaintiff filed the instant suit alleging that D3 and the other defendants (all of whom were witnesses in Suit 69) had conspired to obtain the judgment in Suit 69 in D3's favour. Shortly after the instant suit was filed, a consent order was recorded for the judgment sum held by LKG to be paid into court pending 'the final disposal of this suit'. When the plaintiff's claim in the instant suit was dismissed, D3 applied for the judgment sum to be paid to its solicitor's client's account. The plaintiff opposed the application contending, inter alia, that since it had filed an appeal to the COA against the dismissal of the instant suit, it would be prejudiced if D3's application was allowed.

Held, allowing D3's application:

(1) The word 'suit' in the consent order did not mean or include an appeal. The words 'final disposal of this suit' therefore must refer to the suit itself and could not include the appeal. If the consent order meant to refer to final disposal of the appeal, then it would have stated so. To read the consent order otherwise would be to rewrite the same (see para 29).

(2) An appeal in itself did not automatically operate as a stay. This was trite law and also provided for in O 55 r 16 of the Rules of Court 2012. Until

and unless an order for stay was granted by the court, the argument that the court had to maintain status quo until the plaintiff's appeal was disposed of was bereft of merit (see paras 30–32).

(3) It was not wrong for D3 on its own to apply for the release of the judgment sum as the same was due to D3 when Suit 69 was decided in its favour. The plaintiff argued that the consent order did not specifically state to whom the judgment sum should be paid. In the absence of any indication of the recipient of the sum, the most logical interpretation to be given was for the judgment sum to be released to the party who was entitled to it. D3 was entitled to the judgment sum since 2015 and that entitlement should not be stymied. If D3's application was for the judgment sum to be released to its solicitor's client account, then that application should be allowed. Allowing the application did not amount to rewriting the consent order but, on the contrary, gave effect to it (see paras 36–37 & 39–41).

[Bahasa Malaysia summary

Defendan ketiga ('D3') dalam guaman ini telah menyaman plaintif dan memperoleh penghakiman kewangan terhadapnya ('jumlah penghakiman') dalam guaman sebelumnya ('Guaman 69'). Plaintif merayu terhadap penghakiman itu kepada Mahkamah Rayuan ('MR'). D3 bersetuju untuk membenarkan plaintif menangguh pembayaran jumlah penghakiman sementara menunggu pendengaran rayuan itu dan selama tempoh interim itu, jumlah penghakiman dipegang oleh pemegang kepentingan ('LKG'). Berikutan penolakan rayuannya, plaintif memfailkan saman ini yang mendakwa bahawa D3 dan defendan lain (kesemuanya adalah saksi dalam Guaman 69) telah berkomplot untuk mendapatkan penghakiman dalam Guaman 69 berpihak kepada D3. Tidak lama selepas guaman ini telah difailkan, perintah persetujuan direkodkan untuk jumlah penghakiman yang dipegang oleh LKG untuk dibayar ke mahkamah sementara 'guaman ini selesai'. Apabila tuntutan plaintif dalam guaman ini ditolak, D3 memohon jumlah penghakiman yang akan dibayar kepada akaun klien peguamcara. Plaintif yang menentang permohonan tersebut menyatakan, antara lain, bahawa kerana ia telah memfailkan rayuan kepada MR terhadap penolakan guaman ini, ia akan diprejudiskan jika permohonan D3 dibenarkan.

Diputuskan, membenarkan permohonan D3:

(1) Perkataan 'guaman' dalam perintah persetujuan tidak bermaksud atau termasuk rayuan. Oleh sebab itu, perkataan 'guaman ini selesai' mestilah merujuk kepada guaman itu sendiri dan tidak boleh memasukkan rayuan itu. Jika perintah persetujuan bermaksud merujuk kepada penyelesaian rayuan tersebut, maka ia akan dinyatakan demikian. Untuk membaca perintah persetujuan sebaliknya akan menulis semula perkara yang sama (lihat perenggan 29).

(2) Suatu rayuan dengan sendiri tidak beroperasi secara automatik sebagai penangguhan. Ini adalah undang-undang mantap dan juga diperuntukkan dalam A 55 k 16 Kaedah-Kaedah Mahkamah 2012. Sehingga dan melainkan jika suatu perintah untuk penangguhan diberikan oleh mahkamah, hujahan bahawa mahkamah terpaksa mengekalkan status quo sehingga rayuan plaintif selesai adalah ketiadaan merit (lihat perenggan 30–32).

(3) Ia tidak salah untuk D3 sendiri untuk memohon pelepasan jumlah penghakiman itu kerana yang sama dihutangkan terhadap D3 ketika Guaman 69 diputuskan berpihak padanya. Plaintif berhujah bahawa perintah persetujuan itu tidak secara khusus menyatakan kepada siapa jumlah penghakiman perlu dibayar. Sekiranya tidak ada petunjuk penerima jumlah itu, tafsiran yang paling logik yang diberikan adalah untuk jumlah penghakiman yang akan dikeluarkan kepada pihak yang berhak terhadapnya. D3 berhak menerima jumlah penghakiman sejak 2015 dan hak tersebut tidak boleh dihalang. Sekiranya permohonan D3 adalah untuk jumlah penghakiman yang akan dikeluarkan kepada akaun klien peguamcara, maka permohonan itu hendaklah dibenarkan. Membenarkan permohonan itu tidak bersamaan dengan menulis semula perintah persetujuan tetapi, sebaliknya, memberi kesan kepadanya (lihat perenggan 36–37 & 39–41).]

Notes

For cases on effect of consent order, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2384–2387.

Cases referred to

Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)

Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors [2019] 4 MLJ 726; [2019] 6 CLJ 419; [2019] 1 LNS 613, FC (refd)

Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm) [2002] 6 MLJ 579; [2003] 5 CLJ 298, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Lee Heng Moy & Ors v Pacific Trustees Bhd & Ors [2016] MLJU 1672; [2016] 6 CLJ 368, CA (refd)

Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661; [2010] 3 CLJ 924, CA (refd)

Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465; [2004] 2 CLJ 301, FC (refd)

Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd [2008] 6 MLJ 342; [2008] 6 CLJ 160, CA (refd)

Tong Lee Hwa & Anor v Chin Ah Kwi; Tong Chong Fah v Chin Ah Kwi [1971] 2 MLJ 75, FC (refd)

Legislation referred to

Bills of Exchange Act 1949 s 2
Rules of Court 2012 O 55 r 16

C Sivasankar (Thina & Assoc) for the plaintiff.
Shaik Saleem @ Sh Adam bin Sh Mohd Daud (Shaikh Adam & Co) for the third defendant.

Evrol Mariette Peters JC:

THE APPLICATION

[1] This application, filed as encl 233, was made by the third defendant for the release of money in the amount of MYR1,755,815.92, a judgment sum that was obtained by the third defendant against the plaintiff in a previous suit.

[2] This judgment sum was deposited into court pursuant to an order dated 17 October 2017.

[3] The third defendant's application was allowed with costs.

[4] The following are therefore my reasons for allowing the third defendant's application.

THE BACKGROUND FACTS

[5] A narrative of the background facts, which led to this application, is imperative, as it involves the intertwining of two suits, Suit 69 and the current Suit 193.

[6] On 28 May 2015, in the previous combined suits of 22-NcVc-69–04 of 2014 and JA-A52NcVc-37–04 of 2014 ('Suit 69'), the third defendant (who was the plaintiff in Suit 69) obtained judgment against the plaintiff (who was the defendant in Suit 69) for a judgment sum of MYR1,955,815.92.

[7] The plaintiff then filed an application for stay pending disposal of the matter by the Court of Appeal.

[8] The third defendant's previous solicitor agreed to the stay on condition that MYR200,000 be deducted from the amount of MYR1,955,815.92 and paid to the third defendant's (then) solicitors.

[9] This left a balance of MYR1,755,815.92 ('judgment sum') which was paid to Messrs Lau Kok Guan ('LKG') as stakeholder.

[10] The plaintiff's appeal to the Court of Appeal, and application for leave to appeal to the Federal Court were dismissed respectively by the Court of Appeal and Federal Court.

[11] On 5 September 2017, the plaintiff filed Suit 193, ('current suit') against the first to fifth defendants for conspiring in Suit 69 to obtain judgment in their favour.

[12] This gave rise to another round of litigation, albeit with additional parties.

[13] It is pertinent to note the roles played by the parties in the current suit and Suit 69:

(a) the first defendant is the son of the plaintiff, and the former had given evidence in Suit 69 in favour of the third defendant;

(b) the second defendant is the owner of the third defendant;

(c) the third defendant was the plaintiff in Suit 69;

(d) the fourth defendant is the owner of the fifth defendant; and

(e) the fifth defendant is the subcontractor to the third defendant.

[14] With the exception of the third defendant, the rest of the defendants in the current suit were witnesses in Suit 69.

[15] By a consent order dated 17 October 2017, the judgment sum owing to the third defendant in Suit 69 since 2015, was deposited into court.

[16] The current suit was heard by the High Court judge who dismissed the plaintiff's claim on 28 February 2019.

[17] The third defendant now applies for the judgment sum to be deposited into the client account of his solicitors, Messrs Shaikh Adam.

THE ISSUE

[18] The main issue revolved around the interpretation of the consent order dated 17 October 2017 recorded by the previous judicial commissioner. The consent order reads as follows:

Bahawa wang amanah (stakeholder sum) berjumlah MYR1,755,815.92 mengikut

Perintah Persetujuan di Mahkamah Tinggi, JB dan Mahkamah Rayuan Putrajaya yang dipegang oleh Peguamcara wang amanah, Tetuan Lau Kok Guan, Liana & Kuan dalam akaun bank simpanan tetap didepositkan ke Mahkamah Yang Mulia ini sebagai wang amanah dalam masa tujuh hari dari tarikh perintah ini dibuat dan dipegang oleh Mahkamah Yang Mulia ini *sehingga pelupusan akhir guaman sivil ini*; (Emphasis added.)

[19] The sub-issues following from the main issue are as follows:

(a) the meaning of 'final disposal of this suit'; and

(b) whether the order directs for the payment to the made to all the defendants named in Suit 193.

THE LAW

[20] The law on the effect of a consent order is trite and has been expounded by the Federal Court in several cases including *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145; *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301; *Tong Lee Hwa & Anor v Chin Ah Kwi; Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75; *Lee Heng Moy & Ors v Pacific Trustees Bhd & Ors* [2016] MLJU 1672; [2016] 6 CLJ 368, and most recently in *Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors* [2019] 4 MLJ 726; [2019] 1 LNS 613 (FC).

[21] In *Lee Heng Moy & Ors v Pacific Trustees Bhd & Ors* [2016] MLJU 1672; [2016] 6 CLJ 368, it was stated by Mary Lim JCA:

It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties: *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145. Such a consent order must therefore be given its full contractual effect — see *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301. Such an order remains valid, effective and binding on all the parties involved until and unless the order is set aside for some vitiating reason — see the Federal Court's decision in *Tong Lee Hwa & Anor v Chin Ah Kwi; Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75; [1971] 1 LNS 143. In fact, until that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms.

[22] A consent order is akin to a contract with superadded command of the court: *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465.

CONTENTIONS AND FINDINGS

[23] Counsel for the plaintiff, in opposing the third defendant's application alluded to the fact that the plaintiff had already filed an appeal at the Court of

Appeal against the decision of the judge dated 28 February 2019 in Suit 193, and therefore the release of the money would prejudice the plaintiff.

Meaning of 'suit'

[24] The plaintiff's argument raises the issue of the meaning of the words in the consent order, namely:

> ... sehingga pelupusan akhir guaman sivil ini [final disposal of this suit]

[25] The further question is whether 'suit' includes 'appeal'. The meaning of the word 'suit' is therefore vital.

[26] There is a dearth of statutes that define 'suit'. Although the Bills of Exchange Act 1949 ('the Act') is not applicable to the facts of this case, assistance may be derived from the definition of suit found in s 2 (*Interpretation*) of the Act:

> Suit includes action, counter-claim and set-off

[27] According to the *Istilah Undang-Undang by Dewan Bahasa & Pustaka*, the Bahasa Malaysia translation of 'guaman' is 'suit'. If the former JC meant to refer to appeal, he would have employed the term 'rayuan'.

[28] It is also useful to refer to cases on the definition of 'suit'. In *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm)* [2002] 6 MLJ 579; [2003] 5 CLJ 298, it was explained by Richard Malanjum J (as he then was):

> ... the word 'suit' itself should be self-explanatory in that it should be confined to a fresh action and not to a proceeding which is a continuation from an existing action.

[29] It follows therefore that 'suit' does not mean or include an appeal. The words 'final disposal of the suit' therefore must refer to the suit itself and cannot include the appeal, because if the consent order was meant to refer to final disposal of the appeal, then it would have stated so. To read the consent order otherwise would be to rewrite the same.

Whether an appeal automatically operates as a stay

[30] Secondly, an appeal in itself does not automatically operate as a stay. This is provided for in O 55 r 16 of the Rules of Court 2012:

> Stay of execution

(1) An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

[31] This is trite law and is also reiterated in the landmark case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 by Augustine Paul FCJ:

An appeal shall not operate as a stay of execution unless the court so orders

[32] Until and unless an order for stay is granted by the court, the argument that the court has to maintain status quo until disposal of the plaintiff's appeal is disposed of, is bereft of merit.

Strict compliance with consent order

[33] Counsel for the plaintiff referred to specific cases such as *Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd* [2008] 6 MLJ 342; [2008] 6 CLJ 160 and *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661; [2010] 3 CLJ 924 on the importance of complying strictly with the terms of the consent order.

[34] Counsel for the plaintiff proceeded to argue that strict compliance with the consent order would mean that the application to release the judgment sum must be made by all the defendants in Suit 193.

[35] I am unable to agree with this contention. Although the current suit refers to all five defendants, the court cannot ignore the fact that the genesis of the current suit is Suit 69 which involved only the third defendant and the plaintiff, and no other party. In fact, the other defendants were brought into the scenario in the current suit only because the plaintiff named them as such.

[36] Counsel for the third defendant alluded to the fact that he did in fact represent the second to fifth defendants. However, I am of the view that it is not wrong for the third defendant on its own to apply for the release of the judgment sum as the judgment sum was due to the third defendant when Suit 69 was decided in its favour.

[37] It was further argued by counsel for the plaintiff that the consent order does not specifically state to whom the judgment should be paid. In fact, all the consent order states is that 'wang amanah … dipegang on Mahkamah Mulia ini sehingga pelupusan akhir guaman sivil ini'.

[38] On this note, it is important to bear in mind the words of Rohana Yusuf FCJ in the Federal Court case in *Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors* [2019] 4 MLJ 726; [2019] 6 CLJ 419 at para [28]:

> The canons of interpretation are as familiar as any canons of construction would be to a legal practitioner. The paramount consideration is to ascertain the intention of the parties to the consent judgment. *Such intention is to be objectively assessed by the court, in particular by reviewing the language employed in the consent judgment*. (Emphasis added.)

[39] Therefore, in the absence of any indication of the recipient of the judgment sum, the most logical interpretation to be given is for the judgment sum to be released to the party who is entitled to it.

[40] At this juncture, it also needs to be emphasised that the third defendant was entitled to the judgment sum since 2015, and it is my view that that entitlement should not be stymied; and if the third defendant's application is for the judgment sum to be released to the client's account of his solicitors, then that application should be allowed.

[41] Allowing this application in my view therefore, will not amount to rewriting the consent order. On the contrary, it will be giving effect to it.

CONCLUSION

[42] For the foregoing reasons, the third defendant's application is allowed with costs in the sum of RM2,000 (subject to the payment of allocatur fees).

D3's application allowed.

Reported by Ashok Kumar